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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TERRY LEE NEWBERRY, Defendant and Appellant.	G041991 (Super. Ct. No. 07HF1447) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William Lee Evans, Judge. Affirmed.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

A jury convicted defendant Terry Lee Newberry of two counts of commercial burglary (Pen. Code, §§ 459, 460, subd. (b))[1], one count of forgery (§ 470, subd. (d)), and one count of grand theft (§ 487, subd. (a)), all related to the use of a single counterfeit check. The court sentenced defendant to a state prison term of two years as follows: The middle term of two years on count 1 (burglary); the middle term of two years on count 3 (grand theft), to be served concurrently to the sentence on count 1; the middle term of two years on each of counts 2 (forgery) and 5 (burglary), with execution of both sentences stayed pursuant to section 654. Defendant was also ordered to pay restitution to the victim in the amount of $45,890.

We appointed counsel to represent defendant on appeal. Counsel filed a brief which set forth the facts of the case. Counsel did not argue against his client, but advised the court no issues were found to argue on defendant's behalf. Counsel requested we conduct an independent review of the entire record. (*People v. Wende* (1979) 25 Cal.3d 436.) Defendant was given 30 days to file written argument in his own behalf. That period has passed, and we have received no communication from defendant. We have reviewed the entire record and considered the potential issues tendered by counsel pursuant to *Anders v. California* (1967) 386 U.S. 738, and have not found an arguable issue. The judgment is affirmed.

FACTS

In November 2005, defendant contacted a Smith Barney financial advisor. Defendant stated he had invested in a tire company a number of years ago and that he was expecting an annual dividend check. About one month later, on December 14, 2005, defendant called the Smith Barney financial advisor again and indicated he was having

[1] All further statutory references are to the Penal Code.

some liquidity difficulties. Defendant stated he now had the tire company dividend check, but Bank of America would place a 10-day hold on the check if he deposited it with the bank. He asked whether the Smith Barney representative "knew of a way to get the check cleared quicker than ten days." The Smith Barney representative "offered to assist [defendant] in opening an account and for . . . us manually [to] go through the process of getting verification from the other bank that, in fact, it was a check that completely cleared [so] that we could get him cash within the 10 day period."

Defendant entered the Smith Barney office the next day, on December 15, 2005, signed the paperwork to open an account, and presented the dividend check for deposit in the amount of $45,800.90. In the course of filling out the paperwork for the account, defendant stated his estimated net worth was $28 million, and his estimated liquid net worth was $9.7 million.

Five days later, on December 20, 2005, defendant again entered the Smith Barney office to pick up three checks he had requested to be issued from his account. The first was a Smith Barney personal check payable to defendant in the amount of $2,500. The second was a cashier's check in the amount of $10,000 payable to Bank of America for the benefit of defendant. The third was also a cashier's check in the amount of $10,000 payable to Bank of America for the benefit of defendant.

The next day, December 21, 2005, defendant requested Smith Barney to send a wire transfer of $5,000 to a Wells Fargo account. Smith Barney complied with defendant's request, and the money was wire transferred to a Wells Fargo account in defendant's name.

Finally, on December 26, 2005, defendant requested the balance of the funds in his Smith Barney account to be wire transferred to the same Wells Fargo account in the amount of $18,262.54.

The original check defendant used to open the Smith Barney account was a counterfeit. It was purportedly drawn on the account of Southern Tire Mart, LLC,

located in Columbia, Mississippi, at First Tennessee Bank in Johnson City, Tennessee. The controller of Southern Tire Mart testified that the company had only two owners, the business has never had any investors, the business never issued a check to defendant, and that the check defendant used to open the Smith Barney account was "fraudulent." Another check with the same check number had been issued to a company named Gauthier Homes in the amount of $129.60.

DISCUSSION

Defendant's convictions for one of the burglaries and the forgery were based on his entry into the Smith Barney office on December 15, 2005, to open his account and deposit the counterfeit check, and his tendering of the check for deposit. The grand theft conviction and the second burglary conviction were based on defendant's entry into the Smith Barney office on December 20, 2005, to pick up and then carry away three checks payable to defendant or for his benefit in the total amount of $22,500.[2]

The evidence was plainly sufficient to support defendant's convictions. Indeed, the evidence was overwhelming.

"Every person who enters any . . . building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (§ 459.) Every person who, with intent to defraud, passes a check as true and genuine, knowing it to be counterfeited, is guilty of forgery. (§ 470, subd. (d).) And every person "who shall feloniously steal, take, carry, lead or drive away the personal property of another . . . is guilty of theft." (§ 484, subd. (a).)

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[2] The wire transfers to Wells Fargo on December 21 and 26, 2005 were the basis of another grand theft charge, but the prosecutor had mistakenly alleged Wells Fargo to be the victim instead of Smith Barney. That count was dismissed after the case was submitted to the jury for failure of proof.

As to the forgery count, the undisputed evidence that the purported issuer of the $45,800.90 check had never heard of defendant, had never had an outside investor, and had issued a check to another entity which bore the same number as the check purportedly issued to defendant, establishes that defendant knew the check he presented to Smith Barney was false. When defendant presented the counterfeit check to Smith Barney for deposit to his newly opened account, he completed the crime of forgery. And when defendant entered the Smith Barney office for the purpose of opening an account and depositing the phony check, he unquestionably committed the crime of burglary.

Thereafter, when defendant entered the Smith Barney office for the purpose of picking up three checks totaling $22,500, he manifestly knew he was drawing on non-existent funds and thereby taking money belonging to Smith Barney, and thus completed a second burglary and a grand theft.

Counsel suggests we consider whether the evidence was sufficient "to support the critical element that [defendant] used the counterfeit check with the intent to defraud." To state this potential issue is to answer it. Why else would a counterfeit check be used but for the purpose of defrauding another? And, as noted, there is no question that defendant knew the check was counterfeit.

Counsel also suggests we consider whether the prosecutor committed *Griffin*[3] error in closing argument. Counsel did not suggest which of the prosecutor's statements we should consider. We nevertheless have reviewed the prosecutor's closing argument. The only incident to which counsel may be referring occurred when the prosecutor noted the similarity of the counterfeit check to an actual Southern Tire Mart check, including the account number, the actual name of the company's controller as one of the signers of the check, and the use of a legitimate check number. The prosecutor then said, "How did [defendant] get all [of] that information is not relevant to this case[.]

[3] *Griffin v. California* (1965) 380 U.S. 609.

That's one of the unanswered questions." The comment drew an objection which the court overruled, stating: "It's a logical argument because there was no evidence. She can comment it's not relevant." The court did not err. Although the prosecution may not comment upon a defendant's failure to testify, that rule does not "extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339.) And, if anything, the prosecutor's comment explained why defendant *should not* have testified to the missing information — it was not relevant. The suggested *Griffin* error is not error at all, nor is it arguable error.

Our independent review of the record has failed to disclose any other arguable issues. Counsel's assessment of the appeal was correct.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.